In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1640

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, having interests under conditional sales contracts in three automobiles which were forfeited in separate actions under 49 U.S.C. 782 because they had been used to facilitate the transportation of counterfeit Federal Reserve notes in violation of 49 U.S.C. 781, was denied remission or mitigation of the forfeitures by the Attorney General since it had negligently failed to make adequate inquiry concerning the criminal records or reputations of the purchasers of the vehicles at the time that it acquired the contracts. In a combined appeal, the court of appeals affirmed.

Petitioner contends here (as it did in both courts below) that it was deprived of its rights under the Fifth Amendment because (1) the forfeitures constituted penal sanctions for conduct on its part which was not criminal, (2) the applicable statutes are unconstitutionally vague in that they fail to give adequate notice of the conduct required of the lienholder in order to avoid the penal sanctions, and (3) if the applicable statutes are civil rather than penal in nature, the forfeitures constituted a taking of its property interests without just compensation.

Petitioner's contentions are without merit. Assuming the vehicle forfeitures were penal in nature (cf. *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721–722), their penal impact was upon the purchasers of the vehicles, not upon petitioner. While, as lienholder, petitioner was technically the legal owner of the vehicles, its interests in them were reversionary only; the vehicles served as security for the debts owed to it by the purchaser. The forfeitures did not extinguish these debts since, despite losing possession of the vehicles, the purchasers are still liable under the contracts. It is this continuing liability, in fact, which gives the forfeiture statute its impact. See *United States* v. *One 1941 Pontiac Sedan*, 83 F. Supp. 999, 1000–1001 (S.D. N.Y.). When a forfeited vehicle is remitted to a lienholder, the purchaser's debt is thereby satisfied and his only loss is his equity in the vehicle—frequently minimal due to the vehicle's depreciation. Petitioner's real contention is thus that its claim against the vehicles as satisfaction of the purchasers' debts should be afforded legal precedence

over the government's forfeiture claims. It is not a violation of the Fifth Amendment to deny a lienholder that precedence if, as here, it negligently failed to make the necessary inquiries when the debts were contracted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

U. S. GOVERNMENT PRINTING OFFICE: 1972